SUPREME COURT, U. S.

Supreme Court Of The United States

OCTOBER TERM, 1974

CASE NO. 74-1280

Supreme Court
FILED
MAY 5
MICHAEL RODAK, JR.

NAT HARRISON ASSOCIATES, INC.,
Petitioner

versus

LOUISVILLE GAS & ELECTRIC CO.,
and OHIO VALLEY TRANSMISSION CORP.,
Respondents

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

GERALD KIRVEN
501 South Second Street
Louisville, Kentucky 40202
(502) 584-1135
Attorney for Respondents

JEFFERSON D. STEWART III
MIDDLETON, REUTLINGER & BAIRD
501 South Second Street
Louisville, Kentucky 40202
Of Counsel

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY. 40207

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STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case except for Petitioner's failure to state that the case was twice tried (A. 2).

ARGUMENT

It seems inconceivable, but Petitioner comes to this Court complaining about something that never happened in the Court of Appeals.

Petitioner's complaint is that the Court of Appeals acted as a super jury in reviewing evidence, disbelieving the evidence, and therefore setting aside the verdict of a

jury returned in Petitioner's favor on that evidence at the *second* trial.

The Court of Appeals did no such thing.

Petitioner fails to tell this Court that there were two trials in the district court. The first trial resulted in a hung jury (A. 2). After the failure of the jury to agree upon a verdict in that case, Respondents moved for the entry of judgment in their favor notwithstanding the failure of the jury to reach a verdict (*Ibid.*). The district court overruled that motion, likewise overruled Respondents' motion to retry the case without a jury, and empaneled a jury to retry the case (A. 2-3). It was the jury at the second trial which returned a verdict in favor of Petitioner (A. 3).

The *holding* of the Court of Appeals is that Respondents' motion for judgment notwithstanding the failure of the jury to reach a verdict at the *first trial* should have been sustained (A. 3, n. 3). The evidence which the Court of Appeals discusses in the light most favorable to Petitioner is evidence received at the first trial. Because of its decision that the district court should have entered judgment for Respondents, as a matter of law, following the first trial, the Court of Appeals never reached and did not rule upon Respondents' assignment of errors relating to the second trial (*Ibid.*). It had no occasion to and did not consider the second trial evidence. Not having considered the second trial evidence, the Court of Appeals cannot have acted as a super jury with respect to the second trial verdict and did not do so.

The issue which Petitioner might, but did not, raise is whether the Court of Appeals correctly determined

that the evidence was insufficient to justify the district court in having submitted the case to the jury at the first trial.

This issue is crucial to Petitioner's present posture, since, unless the Court of Appeals erred in holding that there was no jury issue, there never should have been a second trial. Even though Petitioner has not challenged this holding, Respondents can easily show that the Court of Appeals was right.

Since this was a diversity case involving the reformation of a contract, the district court's duty was to follow Kentucky law. Under Kentucky law, a contract may be reformed on account of unilateral mistake only if plaintiff shows by clear and convincing evidence (1) plaintiff's mistake *and* (2) defendant's fraud or inequitable conduct. *Beatty* v. *Donahue*, Ky., 249 S.W.2d 33, 35 (1952); *Deskins* v. *Leslie*, Ky., 387 S.W.2d 596, 597 (1965).

Review of the first trial evidence by the Court of Appeals in the light most favorable to Petitioner shows that Petitioner failed on both counts to make a clear and convincing case. The Court found that the only witness who testified for Petitioner that a mistake had been made was patently unbelievable (A. 11). The Court further found that there was no showing of fraud or inequitable conduct on the part of Respondents (A. 15). The failure of Petitioner to make a case on clear and convincing evidence on either count required the district court not to submit the case to a jury after the evidence had been received at the first trial. Petitioner cannot doubt the power of the district court, "according to the rules of the common law," to have directed a verdict for

Respondents at the first trial, *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 659 (1935), or to have set aside the verdict had the jury returned an erroneous one. *Capital Traction Company* v. *Hof*, 174 U.S. 1, 16 (1899). Thus there is no infringement of the Seventh Amendment in the Court of Appeals' holding that Petitioner's evidence at the first trial was insufficient to create a jury issue. "[T]here is no constitutional bar to an appellate court granting judgment *n.o.v.*" *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 322 (1967). This Court has thus already decided the only issue which Petitioner might have raised.

Petitioner makes no complaint of the finding by the Court of Appeals that there was no showing of fraud or inequitable conduct by Respondents. Petitioner must, but cannot and did not, show a reason why this finding is erroneous.

CONCLUSION

Superficially, it may be appealing for Petitioner to ask this Court to exercise its power of supervision and not sanction an alleged Court of Appeals violation of the Seventh Amendment.

A reading of the opinion below, however, at once demolishes as groundless the charge that the Court of Appeals re-examined jury findings at the second trial. It correctly decided that there never should have been a second trial because of Petitioner's failure to make a case at the first trial.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GERALD KIRVEN
501 South Second Street
Louisville, Kentucky 40202
Telephone: (502) 584-1135
Attorney for Respondents

JEFFERSON D. STEWART III
MIDDLETON, REUTLINGER & BAIRD
501 South Second Street
Louisville, Kentucky 40202
Of Counsel

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